No. 18916

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

KINCAID & KING CONSTRUCTION COMPANY, INC. a corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA, for the use of WILLIAM OLDAY: CONTINENTAL CASUALTY COMPANY, a corporation; and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

BRIEF OF APPELLEE, Continental Casualty Company, on Second Appeal

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I

APPELLEES SUPPLEMENTAL STATEMENT OF CASE

This case was before this court previously and by opinion filed February 21, 1962, the appeal was dismissed for the reason that from the record it did not appear either from the findings of fact or judgment that the District Court had made any disposi-

tion or determination on Kincaid & King's counterclaim against Olday. In that opinion it was stated that if the matter should be returned to this court after disposition of all claims had been made, the parties on a new appeal might rely upon the records and briefs already filed with the court and with the record properly supplemented, such additional briefs might be filed as seem necessary and appropriate.

Since there is one record already on file, and an additional transcript of hearing upon remand has now been filed, we shall for convenience in this brief refer to pages in the record of the main trial as "(Tr.)." As, for example, "(Tr. 55)." And we shall refer to the record in the hearing on remand as "(R. Tr.)", standing for remand transcript. For example, "(R. Tr. 51)".

This matter came on for hearing after the issuance of the court's previous ruling at Anchorage on May 27, 1963. The trial judge announced that he had refreshed his memory from the record and from his notes and at the opening of the hearing made a statement for the record (R. Tr. 5). In that statement he reviewed his findings of various interferences by the defendant Kincaid & King with the work of the use plaintiff, engineering deficiencies, damages to use plaintiff's work and requirements for extra work (R. Tr. 6, 7) and stated (R. Tr. 7):

> "At the end of the 1955 work season, Olday had completed approximately two-thirds of his contract. The job was not finished during the work season primarily because of government change orders and faulty engineering."

The court went on to state that Olday was induced by Kincaid & King to withdraw the Miller Act suit,

then started, under Kincaid & King's promise to pay for labor used by Olday for the 1956 season and to pay for his gasoline charges (R. Tr. 7, 8). The court stated that after nine days of trial and 1,000 pages of testimony, the court came to the conclusion that Olday had performed extra work in the sum of $30,-000 and judgment in that sum should be entered in his favor, (R. Tr. 8).

The court stated that the dismissal of Continental Casualty Company was because the court was of the opinion that no judgment could be obtained against Olday on the counterclaim of Kincaid & King, and since there could be no liability against the principal there would be no liability against the surety (R. Tr. 9). Recital was then made that following the trial, counsel for Olday failed to prepare findings and judgment, and after a long delay the court requested counsel for Kincaid & King to prepare findings and judgment, which was done, and the findings so prepared were those that were signed (R. Tr. 9).

On the remand, counsel for all parties were heard fully. Testimony was not taken because, as the court stated (R. Tr. 143):

> "I don't see any necessity for reopening the case for the purpose of taking additional testimony. I think all of the testimony was available and although the record does show that at certain times I did sustain an objection relative to the introduction of testimony concerning the so-called counterclaims, nevertheless the record also indicates that a great deal of testimony was introduced relative to those counterclaims. And inasmuch as I distrusted the witnesses who were testifying and their records that they had made, I think it was perfectly within my rights refusing to hear any more testimony. I was

> satisfied and as far as I am concerned, the ruling of the court relative to exhibits U and W was proper, still is proper, shouldn't have been received. Now, and so I think that the thing to do is to have prepared or prepare supplemental findings of fact and conclusions of law."

Upon the basis of the testimony already taken, and based upon a review of the record, the court entered supplementary findings of fact and conclusions of law and judgment from which this appeal is taken.

II

SUMMARY OF ARGUMENT FOR APPELLEE..

This case was fully tried for nine days and defendants were permitted to put in all competent testimony offered on their counterclaim as well as upon the main case. The court's decision upon questions of fact was based upon the court's evaluation of voluminous, often conflicting testimony, and is supported by competent evidence. The judgment in favor of plaintiff Olday is the result of a complete evaluation of the claims and counterclaims of both parties resulting in a substantial balance due plaintiff and since there was no judgment to be entered against Olday, the principal, the court properly dismissed Continental Casualty Company, his surety.

III

ARGUMENT FOR APPELLEE

a. The Findings of Fact Are Amply Sustained

This case is in a peculiar posture before this court where the briefs in the previous proceeding as well as the record in that proceeding, No. 16519, are apparently before the court. We note that the assignments of error made by appellants are not the same in this proceeding as they were in the previous proceeding, yet the briefs in the previous proceeding are, by the terms of the order of the court in the last proceeding, apparently to be considered by the court here. In this rather confusing situation, we note that counsel for appellant indicate that their supplemental specifications of error, Nos. 4, 5, and 6, were argued in their opening and reply briefs which were previously on file.

In the same manner we call attention to the fact that appellee Continental Casualty Company in its previous brief has dealt with these subjects and with the question generally of the factual determinations of the court. As was pointed out in our previous brief, in reviewing factual determinations, this court does not upset findings of the trial court which are supported by competent evidence. See authorities cited in our previous brief.

The trial court at the hearing on remand explained at some length the evidence relied upon in arriving at the figures used in determining the damages. Starting on page 13 of the transcript on remand, the court points out what claims were allowed, the extent to which they were cut down, and the evidence upon which the court relied. It will be noted from

what the court says, that full consideration was given to Kincaid & King's claims of offset and counterclaim and the court relied upon the various exhibits which were admitted into evidence apparently without objection and upon testeimony and the court's evaluation of it and cut down some claims and allowed others. These are not figures drawn from the air, but are based upon the court's actual evaluation of the testimony. The court concludes:

> "And when I got through adding up everything according to 0-1, Olday was entitled to, and I got through adjusting the chargebacks that Kincaid & King had made against Olday, I came to the conclusion that there was approximately $30,000 between the two figures, and that's the way I arrived at the $30,000."

What counsel for appellant is apparently doing is asking the court to scan the record to determine whether it would have decided the facts differently than did the trial court. The trial court pointed out that Olday probably would have had a much larger claim had his records been in better condition. The trial court read into the record a portion of the record of the previous case that had been omitted from the previously certified transcript to this court (R. Tr. 34), where the court set out his remarks in the previous case as follows:

> "I feel sorry for him—I am talking about Olday now—because I feel if he would have kept adequate records he could have had somewhat of a substantial judgment, but I am going to have to—and the reporter has this IGM—but I think it's—decide this case primarily upon the records kept either by the company or by the defendant."

The court went on again at R. Tr. 34 to explain how the figures were arrived at.

With respect to appellant's attack upon the validity of the court's findings, we simply say that the court had to do the best it could with the type of records that were before it and it believed some witnesses, disbelieved others, relied upon some records, rejected others, and in a very complicated case, sifted out the conflicting testimony and arrived at figures respecting the amount of the damage. This is not the sort of factual matter to be reviewed on appeal. We again refer to our brief and authorities in the previous matter, No. 16519.

b. Appellant Was Fully Heard On Its Counterclaim

The main thrust of appellant's brief is directed to the contention that the court did not hear appellant's counterclaim. The record simply will not bear this out. Assignments of error 2, 3, 7, 8, 9, 11 and 12, are actually all concerned with this unfounded contention.

The fact is that the court took *extensive testimony relative to appellant's counterclaim.* Nowhere does counsel even contend that on the question of *liability* of appellees any restriction was placed upon the evidence offered by appellant.

Nowhere was plaintiff's counterclaim rejected, but plaintiff offered *extensive evidence* in proof not only of *liability* but also in proof of the amount of it, and this was received by the court. Plaintiff Olday rested the case on transcript 666, and thereafter defendant called the following witnesses: David L. Bear, Wayne Davis, Winfield W. Reynolds, Francis Poplosko, Herbert Kittler and Yewell A.

Smith. These witnesses all testified for defendant and nowhere in their testimony did there appear to have been any restrictions on the receipt of evidence except after the witness Smith had testified for approximately 52 pages of transcript, pages, 1036 to 1103, when two cumulative documents purporting to be compilations of items of the counterclaim were rejected by the court.

All of these witnesses went into the question of liability of Olday as well as Kincaid & King's own defense, and also into the question of the *items* of Kincaid & King's counterclaim. Counsel's complaint in appellant's brief is that plaintiff was not allowed to prove its back charges against Olday. References to the record will show that starting at about page 1053 of the transcript, witness Smith's testimony was concerned with little else than undertaking to prove the amount of these back charges. he testified at great length about what the back charges were, the sources of the figures and how much they were (Tr. 1054). Part of these are summarized in exhibit A-K. The court was fully advised of the basis of the claim against Olday and even of the amount of it (Tr. 1056). The court found that the claim against Olday for the back charges was not meritorious (R. Tr. 54).

Appellant's objection to the proceedings is actually all keyed to the court's rejection of exhibits U and W. These purported to be compilations of amounts to make up the $49,000 back charges of Kincaid & King against Olday. (Tr. 1055). The testimony showed that these documents actually represented compilations made long after the work was done and after suit had been started for the express purpose of developing a new source of

counterclaim, which had never previously been communicated to subcontractor Olday (Tr. 1102, 1103). These were made up from notes taken in 1955 and Olday was not notified that there were any back charges of $49,171 against him until after the suit started (R. Tr. 139) and financial statements had been given by Kincaid & King after 1955 and before trial of this action and no mention had been made of any such bank charges (R. Tr. 139) and the trial court simply did not trust these compilations as authentic back charges against the subcontractor and rejected these two exhibits.

Their rejection was really *not material* because they were only cumulative. Actually, the amounts claimed were stipulated (Tr. 1055), for whatever the figures were worth. Since the court did not find that the back charges were made in good faith or were justified, the admission of exhibits U and W would make no difference anyway because the items listed were not going to be allowed.

Kincaid & King had not proved its case for counterclaim because there was no proof of *liability*. Exhibits U and W only went to the question of the amount if liability had been established. As we said before, the court at no time limited Kincaid & King in their proof as to *liability* of Olday for the back charge. The court made it clear that it was determining there was no liability on this amount in a colloquy with counsel, page 1223 of the record, where the court said to counsel of Kincaid & King:

> "I think there is evidence before the court upon which the court can come to some conclusion whether there is or is not liability. The court may not be able to come to the conclusion as to the amount, but why have a big case here to

> determine the amount of liability until we determine first that there is a liability."

The court went on to say to Mr. Arnell, who was protesting about not admitting the documents (Tr. 1223):

> "You were presenting the evidence as to the amount of damage, not as to the liability—as to the amount of damage."

It was on the basis of the lack of proof of *liability* that the court declined to allow the plaintiff to introduce its two compilations, exhibits U and W. The court's ruling was correct since there was no liability established for the $49,000 item, and it would be a waste of the court's time to go into the proof as to the amounts that made it up.

Since there was a failure of proof to establish *liability* and the court has definitely determined that question in the main case, there was no occasion to reopen for the taking of evidence at the time of the hearing on the remand.

Exhibits U and W were at best only *cumulative* because the witnesses had already testified to amounts, and amounts, for what they were worth, had even been conceded, so that appellant was not in any way injured by the exclusion of these documents.

Apparently the exclusion of these documents was not considered a matter of any great moment by counsel for appellant at the time, as further efforts to prove these amounts were abandoned. Counsel for appellant said (Tr. 1104):

> "Mr. Arnell: If your honor please, in view of the court's last ruling, I think I better request to shorten the proceedings and abandon any

> further proof in support of the cross complaint except as to the amount of the two judgments, Hendricks and the Atkinson judgment, which I have set forth in our third party cross complaint. I wonder if counsel for Continental Casualty Company will stipulate that these amounts are correct."

Then counsel went on to say (Tr. 1104):

> "Mr. Arnell: Mr. Wilson asked that I clarify my statement, your honor. It relates to proof in support of the $49,000 counterclaim against Mr. Olday, insofar as our third party complaint, as we stand on that."

It will be noted that although the court declined to accept the compilations, exhibits U and W, appellant *made no offer of proof* of the *original records* from which they were compiled, and in fact made no offer of proof at all after they had been rejected. The trial court pointed out that if Kincaid & King had offered books of accounts, ledger sheets or other original records, they probably would have been accepted (R. Tr. 141). The court explained what it did as follows (R. Tr. 141):

> "The court: Well, counsel, I have had considerable experience relative to accounting and bookkeeping methods, and if Kincaid & King had kept a book of accounts in which it had a ledger sheet and in that ledger sheet had put in from time to time the amounts of the back charges, I probably would have accepted it. But you see, they didn't have any record at all. All they did, they, their books didn't show any record. All they did is when this complaint was filed, then they went back and reviewed their records to see whether or not they couldn't build up an offset against this claim, which they did, and I had a right to disregard and distrust that record. I am still of the opinion

that I should have distrusted it and consequently it was in my prerogative not to consider it."

There was no occasion to reopen the taking of evidence at the remand where the appellants had not even preserved a proper record by making an *offer of proof,* but had abandoned all further efforts to prove amounts. They were not prejudiced by keeping out exhibits U and W, since those exhibits would merely go to substantiate an amount known to the court and concerning which *liability was not found.*

The court was fortified in his determination that there was no liability for these newly thought up back charges by the pleadings in the case. At the time of the trial the court was concerned with two judgments that had been rendered in Miller Act cases against the surety on the appellant's Miller Act bond. These are referred to as the Hendricks and the Atkinson cases. The amount of the first cross complaint filed by appellant was equal to the sum of these two judgments, $74,534.97 (R. Tr. 62, 63). The second amended complaint again used the same figure apparently indicating that what appellant was trying to offset by the counterclaim was the Atkinson and Hendricks judgments and there is no room left for the $49,000 figure which appellant sought at the trial to prove as a back charge against Olday.

We submit that the trial court was fully justified in finding that the back charge portion of the counterclaim was not valid and was not allowable. Insofar as the two judgments were concerned, they have been completely disposed of and paid (R. Tr. 18, 19). Those judgments having been discharged are no longer a factor in this case. In effect, *Mr.*

Olday has paid them. That is, his surety had advanced to him the money to pay one of the judgments and that has been satisfied, and the United States Fidelity & Guaranty Company, surety for Kincaid and King, has paid through Olday the other judgment. That is based upon the indebtedness of Kincaid & King to Olday as found by the court (R. Tr. 18, 19).

There was no prejudice to the appellant in the rejection of exhibits U and W because they only went to prove amounts of claims that were not allowed by the court and in any event it abandoned all efforts to make that proof, did not offer to submit the same information through *original records,* nor make any offer of proof during the trial, and there was no occasion to reopen the case for the taking of evidence at the time of the remand since the case had been thoroughly tried previously and on the issue of liability the decision had been against appellant.

Appellant's seventh assignment of error, that the court erred in making the supplemental finding of fact No. I, is simply baseless because the court had before it all of the testimony put in in nine days and a ruling on the merits of the counterclaim did not depend upon exhibits U and W which would have done no more than establish the detailed amounts of the claim which the court had determined was not meritorious and would be rejected. Likewise, assignment of error No. 8, directed to supplemental finding of fact, No. II, is not valid because the court had before it the full amount of the counterclaim and in fact this amount was even conceded for what it was worth by Olday's attorney. Assignment of error No. 9 is likewise unsubstantial because the

court did just what this court had indicated it should, that is, dispose of the counterclaim. The court by the supplemental findings of fact and supplemental judgment took definite action based upon the full trial of the case which had gone before, and now found as a fact that no sums are owing by plaintiff Olday to the defendant. The counterclaim has been disposed of and assignments of error 11 and 12 simply do not fit the action taken by the court.

c. The Court Properly Dismissed the Third Party Complaint

The court was clearly correct in dismissing with prejudice appellant's third party complaint. The third party complaint in this case was against Continental Casualty Company. In this case there is a judgment in favor of the principal Olday, and that judgment clearly relieves the surety of any liability. The most fundamental law of suretyship makes the liability of a surety depend upon the liability of the principal. Thus, in 50 Am. Jur, Suretyship, p. 987, § 126, the text states:

> "The natural limit of the obligation of the surety is to be found in the obligation of the principal, and when it is extinguished or released, the surety is in general liberated."

No action could be successfully prosecuted to judgment against the surety on the bond in this case without a judgment being given against the principal.

Counsel for appellant in their brief in the previous cause, No. 16519, cite *Glen Falls Indemnity Co. v. United States,* 229 F. (2d) 370, for the proposition that in a Miller Act case an action over might be

maintained against the surety on a subcontractor's bond. We would not quarrel with that decision but it simply has no application to the situation here. It is important to point out that in this case the bond of Continental Casualty Company *was not a statutory Miller Act bond* but was a conventional performance bond not dependent upon any statute to add to its terms. In this respect it was different from the bond of the prime contractor, Kincaid & King, which was a statutory Miller Act bond; and the action of use plaintiff against Kincaid & King and United States Fidelity & Guaranty Company was an action on a Miller Act bond. However, the counterclaim was not such an action, and whatever the rule may be in regard to maintaining an action against the surety under a Miller Act bond without having found liability against the principal, the rule is clear that in the kind of bond which Continental Casualty Company wrote for Olday, liability of the surety does not exist unless the principal is liable.

The surety, in such a case, is entitled to the benefit of all offsets in favor of the principal. In this case both the surety and the principal Olday were sued together and the prayer of the third party complaint was for a judgment against both. The text of 50 Am. Jur., Suretyship, p. 996, § 139, reads in part:

> "It is the general rule that when the surety and principal are joined as defendants, a claim due from the creditor to the principal may be advanced against the claim of the creditor."

Under this rule, even if it were to be established that the principal Olday had in some respects failed to meet the obligations of the contract but had an offset against Kincaid & King, there would be no

liability of the surety Continental Casualty Company, since the offset is available to exonerate the liability of the surety.

There is nothing in the bond of Continental Casualty Company that creates any primary liability on it. Its bond is strictly one of suretyship and since no obligation of Olday has been established, there is no obligation of Continental Casualty Company. It is impossible to separate the liability of the surety from that of the principal .

Appellant complained that the dismissal of Continental Casualty Company should not have been with prejudice. Such a dismissal, however, was the proper disposition of a cause tried on the merits. During the main trial, appellant's counsel undertook to take a voluntary dismissal without prejudice as to Continental Casualty Company. This was objected to by counsel for Continental Casualty Company (Tr. 1101). The court indicated that he did not see how there could be any liability of Continental Casualty Company if there was no liability of the surety (Tr. 1199, 1200), but then said that as to the right to dismiss without prejudice over the objection of counsel for the surety, that the court was uncertain as to the law, and stated (Tr. 1204):

> "Could we do this—I would be perfectly willing to do this—I would be willing to separate the question of the liability of the insurance companies and allow you to research the law and to present the matter to me on briefs, and then I will research the law for my own and follow your law and come to its conclusion as to whether or not there is any liability. I would be willing to do that. You could send me briefs down to Los Angeles and I can take my time and go over this case."

That was the posture in which the matter was left when the case adjourned. Thereafter, counsel for appellants *never submitted any briefs* to the judge at Los Angeles and when the plaintiff's council was dilatory in submitting proposed findings of fact, conclusions of law and judgment, the court called upon appellant's counsel to prepare finding of fact and conclusions of law in accordance with his interpretation and submit them to the court (R. Tr. 107). In the hearing on remand, the court points out that in preparing those findings of fact and conclusions of law, appellant's counsel, Mr. Arnell himself, proposed findings of dismissal of Continental Casualty Company with prejudice. The court said (R. Tr. 107):

> "And so, Mr. Arnell put in the findings and the judgment, the dismissal with prejudice, he did it on his own volition and not upon the direction of the court."

The court went on to say, on the same page:

> "So I assume, I assume, that it was Mr. Arnell who brought about the dismissal with prejudice of that proceeding."

Under the circumstances, we submit that the appellant is estopped even to raise the issue as to whether there was a right to dismiss Continental Casualty Company without prejudice.

However, under Rule 41 of the Rules of Pleading, Practice and Procedure, a voluntary dismissal could not occur under paragraph (a) (1) after an issue was joined without a stipulation, and it could not occur under subparagraph (2) without leave of the court. Subparagraph (2) reads in part:

> (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this

> rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

The interpretations of the courts of the latter section are to the effect that it is *discretionary with the court* to allow or deny a a voluntary dismissal without prejudice. Moore's Federal Practice, Volume 5, page 1018, says of this rule:

> "The granting of the motion is within the court's discretion and not a matter of right."

The text cites in support of this statement a host of cases including *Larsen v. Switzer,* (8 CAA 1950) 183 F. (2d) 850; *United Railway Press Mfg. Co. v. Williams, White & Co.,* (7 CAA 1947) 168 F. (2d) 489. In *Shaffer v. Evans,* (10 CAA 1958) 263 F. (2d) 134, certiorari denied, 359 U. S. 990, 79 S. Ct. 1119, 3 L. Ed. (2d), it was held that there was no abuse of discretion in denial of motion for voluntary dismissal where the action was well along. The refusal to grant a voluntary dismissal to appellant with respect to a claim against Continental Cosualty Company was an exercise of the sound discretion of the court and it is not a matter of which appellant can complain where its own counsel invited the action by suggesting the form of the findings and judgment and by not submitting a brief to the court on his motion for voluntary dismissal as he had been invited to by the trial court.

The trial court here has decided complicated issues of fact upon a long and involved record after nine days of trial. There is nothing in the record to impeach the result arrived at as to factual determinations. The exclusion of cumulative evidence contained in the compilations, exhibits U and W, was in no way prejudical to defendant which had failed to establish any liability for the amounts which those two exhibits would have substantiated. The court has now disposed of the counterclaim and the appeal should be dismissed.

Respectfully submitted,

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CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated this 26th day of November, 1963.

Lyle L. Iversen

Attorney for Appellees